

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

ENTERGY NUCLEAR VERMONT YANKEE, LLC
and ENTERGY NUCLEAR OPERATIONS, INC.

Plaintiffs,

v.

PETER SHUMLIN, in his official capacity as
GOVERNOR OF THE STATE OF VERMONT;
WILLIAM H. SORRELL, as ATTORNEY GENERAL
OF THE STATE OF VERMONT; and JAMES VOLZ,
JOHN BURKE, and DAVID COEN, in their official
capacities as members of THE VERMONT PUBLIC
SERVICE BOARD

Defendants.

Civil Action No. 11-cv-99

Defendants' Pretrial Statement of Disputed Facts

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As requested by the Court, defendants submit this non-exclusive Statement of Disputed Facts in preparation for the trial on the merits scheduled to begin September 12, 2011.

Defendants incorporate and preserve all responses and defenses set forth in their Answer (ECF Doc. 84), and reserve the right to assert or dispute any fact at trial.

I. Vermont has regulated Vermont Yankee for legitimate reasons unrelated to radiological safety.

1. When ENVY sought to purchase Vermont Yankee (VY), it voluntarily entered into an agreement with the Vermont Department of Public Service (DPS) addressing matters relating to the sale. That agreement, known as the 2002 MOU, Pls.' Ex. 109, does not regulate the radiological safety of Vermont Yankee.

2. The 2002 decision of the Vermont Public Service Board (PSB) approving the sale of Vermont Yankee to ENVY, Pls.' Ex. 126, did not regulate radiological safety.

3. Act 74 was proposed and supported by ENVY, was passed for legitimate purposes within proper state authority, was not motivated by radiological safety concerns, and does not regulate the radiological safety of VY.

4. The challenged portion of Act 74—the need for legislative approval for storage of spent fuel derived from post-March 21, 2012 operations—is equivalent to requirements in the version of Act 74 that ENVY proposed and lobbied for. Defs.' Ex. 1046; Defs.' Ex. 1010 at Track 1.

5. The 2005 MOU in which ENVY agreed to fund the development of non-nuclear clean energy, Defs.' Ex. 5 at 2 ¶ 11, was key to the passage of Act 74.

6. The legislative record for Act 74 shows that legislators were motivated by the legitimate, non-preempted purposes set forth in the statutory text, that they sought guidance on

and understood the limits on state authority, and that the statutory purposes are not a pretext for regulating radiological safety. App. 1–141.

7. Act 160 was passed for legitimate purposes within proper state authority, was not motivated by radiological safety concerns, and does not regulate the radiological safety of VY.

8. The legislative record for Act 160 shows that legislators were motivated by the legitimate, non-preempted purposes set forth in the statutory text, that they sought guidance on and understood the limits on state authority, and that the statutory purposes are not a pretext for regulating radiological safety. App. 142–242.

9. Act 189, which required a state review of the reliability of VY, was passed for legitimate purposes within proper state authority, was not motivated by radiological safety concerns, and did not regulate the radiological safety of VY.

10. The legislative record for Act 189 shows that legislators were motivated by the legitimate, non-preempted purposes set forth in the statutory text, that they sought guidance on and understood the limits on state authority, and that the statutory purposes are not a pretext for regulating radiological safety. App. 243–355.

11. The Act 189 Comprehensive Reliability Assessment of VY was focused on plant reliability and did not intrude on the NRC’s authority to regulate radiological safety. Both the audit itself, conducted by Nuclear Safety Associates (NSA), and the Public Oversight Panel’s review and report, properly addressed the State’s legitimate interest in plant reliability.

12. Consistent with Act 189, the Comprehensive Reliability Assessment and the subsequent Supplemental Assessment focused on the reliability aspects of systems, individual components, and equipment as well as management processes. Security, compliance with regulations, license conditions, and impacts on radiological safety, clearly within the purview of

the NRC, were never considered as part of the Act 189 assessment.

13. Although the NSA reviewed some safety-related systems as part of the assessment, it did so only to the extent those systems impact plant reliability. For instance, where the NRC has specific safety-related system requirements, failure to meet the NRC's requirements may require the plant to reduce power output, which is a reliability concern. The audit did not question or even assess the NRC's requirements in such cases, but considered whether ENVY's failure to meet those requirements might affect reliability. That is a legitimate, non-preempted concern.

14. Neither the NSA assessment nor the Public Oversight Panel's report drew conclusions based on radiological safety. Further, the NSA assessment and Public Oversight Panel's report are complete, and Act 189 has been fully implemented.

15. Reliability is a legitimate state interest, as recognized by the NRC, and is not a pretext for safety. Defs.' Ex. 1116 (Letter from Samuel J. Collins (NRC) to DPS Comm'r O'Brien (July 11, 2008)); Defs.' Ex. 1034 (Letter from Dale Klein (NRC) to Gov. Douglas (Apr. 11, 2008)).

16. The Senate vote in 2010 rejecting S.289 was motivated by legitimate, non-preempted concerns, including matters set forth in the text of S.289 and the following: (1) ENVY's acknowledged misrepresentations to the PSB and other state officials about the existence of underground pipes carrying radionuclides; (2) lack of confidence in ENVY as a corporate citizen in Vermont; (3) concerns about the viability of ENVY's proposed spin-off of VY to Enexus; (4) an interest in moving the State toward a more diverse, renewable-based energy future; and (5) other legitimate concerns related to economics, land use, and energy planning, including the purposes set forth in Acts 74 and 160. App. 356–495.

17. ENVY did not want a legislative vote on S.289 and actively lobbied legislators, including the Speaker of the House, not to bring the bill up for a vote in the Vermont House.

18. The House Speaker's decision not to have a vote on S.289 was motivated by purposes within proper state authority, was not motivated by radiological safety concerns, and did not regulate the radiological safety of VY.

19. States can and do advocate on safety issues with the NRC, and also work with the NRC on safety-related matters such as emergency response planning. The fact that state legislators and other state officials comment on or ask questions about radiological safety is therefore not evidence that the State is intruding on areas regulated by the NRC.

20. The statements of individual legislators or witnesses providing testimony to legislators do not represent the views of the Legislature as a whole, which votes only on the statutory language.

II. The statutory purposes set forth in Acts 74 and 160 are legitimate and non-preempted bases for regulating VY.

21. The statutory purposes set forth in Acts 74 and 160, including energy planning, need for power, choice of power sources and energy diversity, economics, environmental, aesthetics, and land use concerns, and promoting clean, renewable energy sources, are legitimate, plausible bases for state regulation of an in-state nuclear power plant.

22. The Vermont Legislature has actively and consistently been engaged in matters of energy regulation for decades. The debate and discussion in the Legislature throughout that time reflects the Legislature's over-arching priority—energy planning that will meet the State's current and future energy needs in a sustainable, cost-effective way. As a result, the priorities and purposes reflected in the text of Acts 74, 160, and 189—e.g., energy portfolio diversity, promotion of renewable energy resources, ensuring a reliable, economical, environmentally sustainable supply of energy—have been a regular part of the Legislature's public consideration of energy policy since the 1970s, before, during, and after the statutes challenged in this lawsuit.

23. Over the past decade, the Vermont Legislature has delved into many areas of electric industry policy and regulation, with the Public Service Board and DPS following up on the Legislature's initiatives.

24. Among other actions, the Legislature in the past ten years has passed numerous statutes unrelated to VY that address energy efficiency, diversity, reliability, and the promotion of renewable energy. *See, e.g.*, 2011 Vt. Acts & Resolves No. 47 (enacting various energy provisions to increase efficiency, reliability, security, and the use of renewable energy, reduce costs and greenhouse gas emissions, and plan for future energy needs); 2010 Vt. Acts & Resolves No. 159 (same); 2009 Vt. Acts & Resolves No. 45 (same); 2008 Vt. Acts & Resolves No. 209 (same); 2008 Vt. Acts & Resolves No. 92 (establishing efficiency goals and programs and creating Vermont's "25 by 25" goal of producing "25 percent of the energy consumed within the state through the use of renewable energy sources, particularly from Vermont's farms and forests" by the year 2025); 2006 Vt. Acts & Resolves No. 208 (same); 2006 Vt. Acts & Resolves No. 201 (providing business and technical assistance for farmers to harvest biomass, convert biomass to energy, and produce biofuel); 2006 Vt. Acts & Resolves No. 168 (establishing goals for greenhouse gas reductions); 2006 Vt. Acts & Resolves No. 152 (establishing energy "efficiency standards" in order to "reduce pollution and other environmental impacts," "make electricity systems more reliable," "reduce or delay the need for new power plants, power transmission lines, and power distribution system upgrades," "contribute to the economy of this state," "sav[e] consumers and businesses money on energy bills," and "help the state and local economy"); 2006 Vt. Acts & Resolves No. 123 (regarding Vermont's participation in the Regional Greenhouse Gas Initiative); 2005 Vt. Acts & Resolves No. 61 §§ 1-4 (establishing requirements for retail electricity providers relating to the use of new renewable energy sources

and creating the Sustainably Priced Energy Enterprise Development (SPEED) program); 2004 Vt. Acts & Resolves No. 82 (addressing stability and reliability during state of emergency); 2003 Vt. Acts & Resolves No. 69 (adding new statutory chapter addressing energy efficiency and renewable energy programs); and 2002 Vt. Acts & Resolves No. 145 (encouraging diversity of energy portfolio).

25. These legislative initiatives are relevant to any inquiry into the true motive of the Vermont Legislature in regulating VY, and they reflect a consistent commitment to an energy policy and future for Vermont that is efficient, diverse, sustainable, reliable, economical, and environmentally sound.

26. The statutory purposes set forth in Acts 74 and 160 are part of and wholly consistent with the Vermont Legislature's longstanding tradition of promulgating forward-looking energy policy affecting all parts of the State's electric industry.

27. Given that VY, like other merchant nuclear plants, sold a portion of its output within its host state both before and after the 2002 sale to ENVY, all of the legislation affecting VY considered or enacted by the Vermont Legislature over the last decade was enacted against a background expectation that sales from VY to Vermont customers would continue for as long as the plant operated.

28. ENVY actively promoted the expectation that, if it continued to operate after March 21, 2012, it would sell power to Vermont utilities. ENVY told legislators it was undertaking all efforts to reach power purchase agreements with the utilities.

29. Given the Vermont Legislature's longstanding and robust commitment to make a transition to an energy future that focuses on energy efficiency and renewable energy, it was reasonable for the Legislature to be concerned about making decisions that would diminish the

space available in the electric industry for those resources. Specifically, it was reasonable for legislators to be concerned that extending or renewing VY's CPG would undercut development and maturation of those alternative resources and could delay, or even preclude, the desired transition toward resources that (unlike VY) are renewable.

30. The Legislature could reasonably believe that a 2012 closure of VY would create a more immediate incentive for alternative energy sources to come online faster, thereby creating an energy future that is more "diverse" and involves a better "choice of power sources."

31. The siting of renewable energy within a state's borders is an interest that necessarily involves economic concerns such as job creation, tourism, aesthetics, environmental impacts, and land use.

32. The operation of VY for an additional 20 years would significantly increase the amount of spent fuel at the site, especially since the 2004 uprate allowed the plant to operate at significantly higher output than it had historically. Given that there is still no long-term solution for the storage of spent fuel, the Legislature could reasonably believe that a 2012 closure of VY might mitigate non-radiological-safety-related concerns surrounding the management of spent fuel, including economic concerns such as job creation and tourism, and concerns regarding aesthetics and land use.

33. Other states, like Vermont, regulate non-radiological safety aspects of nuclear plants, and have done so for decades. States' economic regulation may have an impact on the construction and operation of nuclear power plants. State and even municipal actions in the past have resulted in the closing of plants and cancellation of construction of new plants.

34. States generally play a substantial and critical role in the oversight of nuclear plants, including merchant plants. In addition to economic concerns, states may regulate nuclear plants

with respect to land use, the environment, aesthetics, reliability, need for power, choice of power sources and energy diversity, and other energy planning issues.

35. The NRC has long recognized that energy planning is a legitimate state interest and that states have the final responsibility for those planning decisions.

36. It is not unusual for states to seek and obtain economic benefits when reviewing and approving applications of various sorts by nuclear plants or by other types of FERC-regulated independent generators. These have included, for instance, payments to special funds, agreements benefiting ratepayers, and environmental commitments. None of these arrangements have been held to transgress into FERC's exclusive wholesale rate-setting jurisdiction.

III. ENVY's past promises and conduct bar its preemption claims.

37. In the 2002 MOU, ENVY considered asserting federal preemption of state authority over the sale of VY, but instead made a business decision, relied upon by others, including the PSB and the Vermont Supreme Court, to make explicit representations and contractual commitments waiving present and future preemption claims against Vermont. Pls. Ex. 109 at 6 ¶ 12.

38. It was reasonably foreseeable in 2002 when ENVY signed the MOU that the Vermont Legislature might change the laws governing the PSB, including the CPG approval requirement.

39. ENVY's post-2002 conduct confirms that the 2002 waiver was unaffected by the Legislature's decision to give itself a role in deciding whether ENVY could operate VY past March 21, 2012. *See, e.g., infra* ¶¶ 40-43; ENVY's Responses to Defs.' Reqs. Admission 1-3, 6, 7, 16, 17; ENVY's Responses to Defs.' Interrogs. 1 & 2.

40. In 2004, when ENVY sought and received approval from the PSB for an uprate to allow ENVY to increase production by roughly 20% in PSB Docket No. 6812 (filed Feb. 21,

2003), the PSB asked ENVY whether there would be enough room to store the additional spent fuel that would be created by the uprate, and ENVY said that it would need to build dry-cask storage units to allow it to operate beyond 2007 or 2008 and explicitly agreed to seek State approval before building those units. Defs.' Ex. 1009 at 86.

41. In 2005, ENVY considered challenging state authority over dry-cask storage as preempted by federal law, but instead made a business decision to actively seek state legislation and to not assert any preemption claim to Act 74 or the PSB dry-cask proceeding.

42. In repeated legislative testimony in 2006 on the bill for Act 160, ENVY testified that it was committed to the State's regulatory processes already in place, including PSB review and legislative approval under Act 74, and did not contend that Act 160 represented a change in the "current law" under the 2002 MOU.

43. In 2008, ENVY sought PSB approval for a CPG to allow operation of VY beyond March 21, 2012, and in so doing acknowledged that it must obtain both a CPG from the PSB and "the approval of the General Assembly" to operate past March 21, 2012, without contending that the "current law" referenced in the 2002 MOU had changed. Defs.' Ex. 1012 at 2 ¶ 4.

44. Because the 2002 MOU provides that the MOU "is governed by Vermont law and any disputes arising under this [MOU] shall be decided by the Board," *id.* at 7 ¶ 16(1), ENVY's claim that the State breached or repudiated the 2002 MOU must be brought before the Public Service Board.

45. The State has been prejudiced by ENVY's decision to wait until the filing of this lawsuit to raise its preemption claims. The PSB expressly relied on ENVY's commitments and representations in approving ENVY's various CPGs, as did the Vermont Supreme Court in approving the sale of VY to ENVY. The State did likewise in passing the legislative acts.

Further, the State has continued to abide by the terms of the 2002 MOU and worked with ENVY in various proceedings in which the State relied on ENVY's waiver of preemption claims.

46. The PSB reasonably relied on statements ENVY made during the 2002, 2004, and 2005 proceedings that it understood it needed State approval to operate beyond March 21, 2012, *see, e.g.*, Defs.' Ex. 1022 at 25; Pls. Ex. 126 at 81-82, and the Legislature reasonably relied on such statements when it passed Act 74. It would now be detrimental to the PSB and the Legislature to deprive them of a say in whether VY operates beyond March 21, 2012.

47. Further, ENVY's preemption claims are directly at odds with the positions it has taken before the PSB starting in 2002 and continuing over the years since. ENVY consistently averred, in briefs and testimony, that it would not challenge the PSB's regulatory authority and specifically would not bring a preemption challenge. *See, e.g.*, Defs.' Exs. 1015 at 18; 1016 at 7-8; 1017 at 6; 1018 at 14.

48. In addition, ENVY's preemption claims are directly contrary to its testimony and arguments in other Federal Court litigation. *See, e.g.*, Defs.' Exs. 1014 at 140-43 & 1019 at 22.

49. The State of Vermont neither breached nor repudiated the 2002 MOU. Rather, the State has fully performed its obligations under the MOU.

Dated September 4, 2011, at Montpelier, Vermont.

STATE OF VERMONT
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